IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL MISCELLANEOUS APPLICATION NO. 137 OF 2002

S T A T E
through Police Inspector,
Margao Town Police Station. ... Petitioner

Versus

Tulsidas alias Viraj
Gaunekar, H.No.184,
Behind G.T.D.C., Patto,
Panaji, Goa. ... Respondent.

Shri A. P.Lawande, Public Prosecutor for the State.

Shri M. S. Sonak with Shri S. M. Singbal and Ms. Pooja Bharne, advocates for the respondent.

CORAM: P. V. KAKADE, J.

DATE: 18th October, 2002.

ORAL ORDER

The State has moved this application under Section 439 (2) read with Section 482 of the Code of Criminal Procedure, for setting aside the Order granting bail to the respondent/accused no.3 in Sessions Case No. 50/2000, which was granted by the IIIrd Additional Sessions Judge, South, Goa, Margao.

2. The brief facts involved in the case are thus:

The respondent alongwith two others was arrested on 3rd August, 2000, in Crime No.268/2000 of Margao Town Police Station, for commission of the offences punishable under Sections 120-B, 302 of the Indian Penal Code, read with Section 25 of the Arms Act. One Mohammad Pandial was a witness in Sessions Case No. 18/2000, in which case one Guru

Pujari was brutally murdered by contract killers as a result of criminal conspiracy. In that case there are three or four accused persons involved which was also a case of criminal conspiracy with intention to murder allegedly hatched up by the accused persons, including the present respondent. The records revealed that the element of conspiracy in Sessions Case No. 50/2000 was the outcome of the Sessions Case No.18/2000, since the accused persons involved therein are alleged to be involved and arrested in the present case, i.e. Crime No.268/2000. The victim in this case, by name Mohammad Pandial, who was a witness in the earlier conspiracy case, was brutally murdered by shooting and one Francis D'Costa had lodged a complaint that on 18th July, 2000 at 8.30 p.m. in front of his shop one unknown male person wearing dark clothes and having his face covered fired gunshots at Pandial. There are statements of witnesses in case papers which reveal that one Miss Netty, the employee of the accused Srikar Kurade, was going to Bambolim and talking to Srikar Kurade and to one Zakarius Rodrigues and one Prashant Naik, who was arrested in this crime on 23rd July, 2000, had disclosed the name of the present respondent and other accused persons, as a result of which the respondent came to be arrested. There was evidence to show that one day after attending the Ponda Court for the some criminal case, while one Zakarius Rodrigues was in judicial lock-up, Zakarius and Prashant Naik had gone to the Hotel Amigos and had lunch with one more accused person of Ponda case. There was also

evidence that when Zakarius was in judicial custody, Miss Netty paid Rs.50,000/- to the mother of Zakarius, Rs.1,00,000/- to the brother of Zakarius by name Bulliver and than again Rs.30,000/- to the said Bulliver. Two Maruti cars were used for the commission of the offence and various mobile phones used for monitoring operations were attached. Two weapons were recovered at the instance of the present respondent. In short, according to the State, there was sufficient evidence against the present respondent to link him with shooting down and killing the witness, who was a star witness of the earlier crime of murder.

The present respondent had filed Criminal Miscellaneous Application No.184/2000 for bail, which the learned Additional Sessions Judge, South Goa, Margao, had, after due consideration of the available record, rejected by a well reasoned Order. On this background the trial of the Sessions Case No.50/2000 proceeded and already the process of recording of evidence is going on. At this juncture, the present respondent/accused no.3, moved application for bail in the pending trial, on the ground that he was in prison for a period of two years and moreover there was no evidence on record to link him with the offence of murder and, as such, he solicited grant of bail. The learned Additional Sessions Judge, South Goa, Margao, considered the application and held that the offence attributed to the accused no.3 was under Section 120-B of the Indian Penal Code, that some arms were

attached at his instance and considering the fact that the part played by the accused no.3 was only meeting accused no.2, as per the statement of the witnesses and the fact that the weapon of offence was not the one which was attached from accused no.3, were sufficient factors to grant bail and in the result, accused no.3 was enlarged on bail on certain conditions. Hence, the present application for cancellation of bail.

3. I have heard Shri Lawande, learned Public Prosecutor, as well as Shri Sonak, learned counsel for the respondent/accused no.3. I have also critically perused the record, including the Order of the learned IIIrd Additional Sessions Judge.

At the outset, it may be noted that it must be borne in mind that the offence alleged against the respondent alongwith two others is that under Section 302 and 120-B of the Indian Penal Code and Section 3 read with Section 25 of the Arms Act. The person whose murder was committed was a star witness in the earlier case of murder and conspiracy thereof, which is also pending adjudication. It is also to be noted that trial has begun and as per the statement made by the learned Public Prosecutor, evidence of two witnesses has been recorded and the remaining evidence is yet to be recorded. Despite this position, the learned IIIrd Additional Sessions Judge in paras 5 and 6 of his Order has

stated that the offence attributed to the accused no.3 is only under Section 120-B of the Indian Penal Code and that some arms were attached from his custody, or at his instance. It is also observed that the respondent is concerned with the offence only by virtue of Section 120-B and the part played by him is only meeting accused no.2, as per the statement of two witnesses, namely Jadav and Felix Rodrigues. This aspect, in my view, is nothing short of pre-judging the merits of the case of which trial is still in progress. It appears that the learned IIIrd Additional Sessions Judge has conveniently overlooked that though the respondent no.2 is arrayed by virtue of the provisions of Section 120-B Indian Penal Code, it is the specific allegation of the prosecution that the respondent is a contract killer and charge of conspiracy of murder is also attributed to him. It also cannot be overlooked that his link with accused no.2, even as per the observation made by the learned IIIrd Additional Sessions Judge, has been established by virtue of the evidence of two witnesses, namely Jadav and Felix Rodrigues and still the lower court came to the conclusion that it was a fit case for respondent's bail, even after commencement of the trial and before its conclusion.

Shri Lawande, learned Public Prosecutor also brought to my notice that earlier bail application of the said respondent was rejected on merits in the month of August, 2000 and since then there was no subsequent

development or any new fact has materialized, which would require fresh consideration for plea of bail of the respondent. On the other hand, as it appears from the record, it is clear that the trial has begun and there was absolutely no reason as to why the learned IIIrd Additional Sessions Judge should not have waited for conclusion of the trial, specially when there is nothing on record to show that the trial is likely to be unduly delayed, for one reason or the other. In other words, the haste in which the bail application is granted after commencement of the trial, pre-judging the evidence on record, cannot be justified in law for a moment.

4. Shri Sonak, learned counsel for the respondent brought to my notice a catena of decisions of the Supreme Court, the ratio of which is to the effect that the parameters for rejection of bail and Order of cancellation of bail are totally different and, therefore, the bail once granted by the IIIrd Additional Sessions Judge to the respondent, need not be cancelled unless the parameters established by the Apex Court are fulfilled. He invited my attention to the ruling of the Supreme Court in the case of **The State through the Delhi Administration** vs. **Sanjay Gandhi**, (AIR 1978 SC 961), wherein it is observed that rejection of bail when bail is applied for is one thing, cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case

than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. It was further argued on behalf of the respondent that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of bail. It is now well-settled by a catena of decisions by the Supreme Court that the power to grant bail is not to be exercised as if the punishment before the trial is being imposed. The only material considerations in such situations are whether the accused would be readily available for trial and whether he is likely to abuse the discretion granted in his favour, by tampering with the evidence. In my considered view there cannot be two opinions regarding the principle laid down by the Apex Court in this regard. However, it cannot be overlooked that while liberty of an individual is precious and there should always be an all-round effort on the part of the law courts to protect such liberties of individuals - but this protection can be made available to the deserving ones only, since the term "protection" cannot by itself be termed to be absolute in any and every situation, but stands qualified depending upon the exigencies of the situation. It is on this perspective that in the event of there being committal of a heinous crime it is the society that needs a protection from these elements since the latter are having

the capability of spreading a reign of terror so as to disrupt the life and the tranquillity of the people in the society. The protection thus to be allowed upon proper circumspection depending upon the fact situation of the matter.

In the present case before us the prosecution has come with a case that the respondent has entered into criminal conspiracy with other accused persons to kill a star witness in another murder case which was again involving criminal conspiracy for killing. Under these circumstances, the principle laid down in the case of **Puran** vs. **Rambilas & Anr.**, (2001 Cri.L.J. 2566) by the Apex Court, should prevail. It is observed by the Supreme Court that it is, however, to be noted that the said Court has clarified that there are circumstances which would call for cancellation of bail and one such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime and that too, without giving any reasons. Such an order would be against the principles of law. The interests of justice would also require that such a perverse order be set aside and bail be cancelled. It must be remembered that such offences are on the rise and have a very serious impact on the society. Therefore, an arbitrary and wrong exercise of discretion by the trial Court has to be corrected.

5. In the present case before us, a plain reading of the impugned Order passed by the IIIrd Additional Sessions Judge, shows that he has totally ignored the fact that though the respondent is involved, with the help of the provisions of Section 120-B of the Indian Penal Code, the entire allegations are in respect of criminal conspiracy for committing murder. Moreover, two witnesses have already been examined and there is absolutely no reason to pre-judge the issue when the trial was in progress and there was every reason to believe that the respondent/accused no.3, if enlarged on bail at that stage, would try to win over the remaining witnesses in the on-going process of trial.

In view of this situation, I have no hesitation to hold that the entire exercise of adjudicating the bail application and passing the impugned Order taken up by the IIIrd Additional Sessions Judge, was arbitrary and unwarranted and, therefore, requires interference by this Court. Hence the following Order:-

The Application is allowed. The Order passed by the learned IIIrd Additional Sessions Judge, South Goa, Margao, in Sessions Case No.50/2000 dated 25th September, 2002, enlarging the accused no.3 on bail is hereby set aside and the bail bond is hereby cancelled. The accused shall surrender to the custody forthwith and in any case on or before 24th October, 2002.

The learned IIIrd Additional Sessions Judge, Margao, is further directed to expedite the trial and hold it on day-to-day basis till the conclusion.

P. V. KAKADE, J.

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